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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. 989

IN THE MATTER OF
WISCONSIN BUILDERS SUPPLY CO.,
BANKRUPT.

GEORGE D. PRENTICE, JR., TRUSTEE OF WISCONSIN BUILDERS SUPPLY CO.,
Petitioner,

vs.

PAUL L. MOSKOWITZ, RECEIVER OF WISCONSIN BUILDERS SUPPLY CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PAUL L. MOSKOWITZ, RECEIVER OF WISCONSIN BUILDERS SUPPLY CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable Earl Warren, Chief Justice of the United States and Associated Justices of the Supreme Court of the United States.

Your petitioner respectfully shows:

I. SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action brought before the Referee in Bankruptcy for the Eastern District of Wisconsin by George

D. Prentice, Jr. Petitioner here, as trustee in bankruptcy of the Wisconsin Builders Supply Co., a Wisconsin corporation and a voluntary bankrupt, for a turnover order to compel the respondent here, Paul L. Moskowitz as a receiver appointed under Chapter 128 of the Wisconsin Statutes more than four months before the filing of the petition in bankruptcy, to surrender all of the assets in his possession or under his control to the said trustee in bankruptcy for administration.

The trial was by the referee, without a jury. The referee rendered an Opinion in favor of your petitioner (Printed record, p. 33). In his Opinion the Referee ruled that the appointment of the State Court Receiver was made pursuant to the provisions of Chapter 128 of the Wisconsin Statutes; that such state legislation was in contravention of the exclusive bankruptcy power granted the Federal Government by the Constitution of the United States and suspended while the Federal Bankruptcy Act was in effect; and that therefore the proceedings in the State Court were void and said State Court Receiver acquired no title to the corporate assets by virtue of such proceedings.

Following the Opinion the Referee made Findings of Fact and Conclusions of law (printed record, p. 48) consistent with such Opinion and upon such Findings and Conclusions entered an Order (printed record, p. 52) directing that the respondent, as such state court receiver, be enjoined from proceeding further with the liquidation or administration of the assets of the Wisconsin Builders Supply Co. and directing that he forthwith deliver such assets to the trustee in bankruptcy and account to the bankruptcy court for his administration of the same.

A petition for review was made by the respondent here to the United States District Court for the Eastern District of Wisconsin, which rendered an opinion affirming the Order of the referee in bankruptcy (printed record, p. 57).

The respondent state court receiver thereupon appealed to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals reversed the District Court and the referee in bankruptcy.

The petitioner-trustee then petitioned the Court of Appeals for the Seventh Circuit for a rehearing *en banc*. This petition was denied.

Pending the decision of petitioner's motion for rehearing *en banc* the City of Milwaukee, Wisconsin, and the Industrial Commission of Wisconsin petitioned the Court of Appeals for the Seventh Circuit for leave to file briefs *amicus curiae* in connection with your petitioner's motion for rehearing. This petition was also denied.

The principal questions involved on said appeal were:

1. Is Chapter 128 of the Wisconsin Statutes suspended because it competes with and is in conflict with the National Bankruptcy Act enacted by Congress under the exclusive power given it by Article I, Section 8, Cl. 4 of the United States Constitution to establish uniform laws on the subject of bankruptcy throughout the United States? and,
2. If Chapter 128 of the Wisconsin Statutes is in part suspended by the enactment by Congress of the National Bankruptcy Act pursuant to such exclusive power given Congress by the Constitution of the United States, can such invalid provisions of the Wisconsin Act be severed?

Which questions were decided by said court adversely to your petitioner and materially affected the determination of said appeal.

II. JURISDICTIONAL STATEMENT.

The statutory provision believed to sustain the jurisdiction of this court is section 1254 of Title 28 of the United States Code.

The statute of the State of Wisconsin, the validity of which is involved is Chapter 128 (printed record, p. 77).

The date of the judgment sought to be reviewed by certiorari is November 27, 1956. A copy is appended as Appendix I.

The date of the decision denying the motion for rehearing is February 4, 1957. A copy is appended as Appendix II.

The date of the decision denying the motion to intervene is February 4, 1956. A copy is appended as Appendix III.

III. QUESTIONS PRESENTED.

1. Did the Court of Appeals err in reversing the judgment of the District Court by holding that the voluntary provisions of Chapter 128 of the Wisconsin Statutes are a mere regulation of a valid common law assignment, rather than a comprehensive and exclusive court administered system for the voluntary and involuntary administration of insolvent estates for the benefit of creditors, which as such is an Act tantamount to bankruptcy?

2. Did the Court of Appeals err in reversing the judgment of the District Court by holding that the involuntary provisions of Chapter 128 of the Wisconsin Statutes, although invalid since in conflict with the National Bankruptcy Act, could be severed from the voluntary provisions, thus permitting the voluntary provisions to stand as a mere regulation of a common law assignment?

3. Did the Court of Appeals err in resting its decision on the provisions of Section 2(a) (21) of the Bankruptcy Act, 11 U. S. C. Chap. 2, Sec. 11, which section provides that the bankruptcy court shall not require delivery of assets which are in the hands of a state court receiver who was appointed more than four months prior to the date of bankruptcy?

IV. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the said Court of Appeals in holding that the voluntary provisions of Chapter 128 of the Wisconsin Statutes are a mere regulation of a common law assignment rather than a state insolvency proceeding is in conflict with the decision of the Court of Appeals for the Tenth Circuit, on a similar state act, in the case of *First National Bank of Albuquerque* v. *Robinson,* reported in 107 Fed. (2d) 50.

2. The decision of said Court of Appeals as to the voluntary provisions of Chapter 128 of the Wisconsin Statutes being a valid regulation of a common law assignment and being severable from the invalid involuntary provisions, is a decision of an important question of local law in a way probably in conflict with applicable local decisions.

3. The decision of the Court of Appeals as to the validity of the voluntary provisions of the Wisconsin Act, by holding that the same are not a state insolvency proceeding conflicting with the National Bankruptcy Act enacted by Congress under the exclusive power given it by the Constitution of the United States, is a decision of a federal question in a way probably in conflict with applicable decisions of this court.

V. ARGUMENT.

1. Chapter 128 of the Wisconsin Statutes as enacted in 1937 and amended in 1939 (which is the act presently before the court) is far more than an expansion of the prior Wisconsin general assignment legislation (as held by the Court of Appeals for the Seventh Circuit (Appendix I, p. 29)) which was approved by this court in *Pobreslo* v. *Boyd,* 287 U. S. 518, 53 S. Ct. 262 (1933) after severing

the invalid discharge provision of the old act. For this reason we submit the following analysis of the conflicting provisions of the present act and the Act as it existed prior to 1937 and 1939:

New Act (Printed Record p. 77).	*Old Act* (Appendix IV p. 36).
Sec. 128.01 adds that *all* (emphasis ours) assignments for the benefit of creditors shall be subject to the provisions of this chapter.	Sec. 128.01 gave circuit court jurisdiction to supervise proceedings in all voluntary assignments made under the provisions of this chapter.
Sec. 128.01(1) adds requirement that every voluntary assignee must file his assignment.	Sec. 128.06 merely made the assignment void against creditors unless filed.
Sec. 128.04. Adopts the definition of insolvency contained in Section 1(19) of the Bankruptcy Act, 11 U. S. C., Chap. 1, Sec. 1, to-wit: "A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed, or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."	Sec. 128.09. Merely defined an insolvent as one whose non-exempt property is insufficient in amount at a fair valuation to pay his debts.
Sec. 128.05(1). Makes it mandatory that the volun-	Sec. 128.06. Only provides that a voluntary as-

New Act.	*Old Act.*
tary assignee file his assignment and requires the court to appoint a receiver or order a meeting of creditors to elect a receiver. (In either case the receiver need not be the assignee.)	signment is void against creditors unless filed, but upon filing and posting bond as required gives no right to court or creditors to supersede assignee by receiver of their choice.
Sec. 128.06. Provides for involuntary proceedings for appointment of receiver for an insolvent debtor who has committed any of the five applicable Acts of bankruptcy referred to in Section 3(a) of the Bankruptcy Act, 11 U. S. C., Chap. 3, Sec. 21. However, the new provision was held invalid by the Court of Appeals in its decision of the instant case and therefore no comparison in detail is made here.	Sec. 128.08. Gave the court more limited powers to compel involuntary appointment of receiver.
Sec. 128.07. Defines a preference in language almost identical to that of Sec. 60a(1) of the Bankruptcy Act, 11 U. S. C., Chap. 6, Sec. 96, and legislates into the receiver the power to avoid and recover such preferential transfers from the transferee.	No comparable or related provision.

Appellant in his original brief at page 36, quoted Rieselbach, one of the draftsmen of the 1937 Act as stating:

"A scrutiny of the law

New Act.	*Old Act.*
prior to the enactment of the 1937 version of Chapter 128 disclosed the following deficiencies which it was believed should be corrected. * * * "2. The title, power and authority of the receiver and assignee *were too limited.*" (Emphasis ours.)	
It is submitted by the appellee-trustee that Section 128.07 of the Act of 1937 corrected the limitations of the receiver's powers under the old act referred to by Reiselbach by legislating into the state court receiver, substantially the powers given a trustee in bankruptcy by the Congress of the United States, legislation, which certainly goes far beyond mere regulation of a common law assignment and gives the state act the major characteristics of an insolvency proceeding.	
Sec. 128.08. Provides for involuntary appointment of receiver for insolvent corporation. Held invalid by Court of Appeals in instant case.	Nothing comparable.
Sec. 128.[illegible]. Provides for meetings of creditors who are given a type of control over the proceedings similar to that given creditors in bankruptcy.	Nothing comparable.

New Act.	*Old Act.*
This section further permits the creditors to remove receiver *without cause* (emphasis ours) irrespective of the terms or provisions of the original assignment or order appointing him.	Nothing comparable.
Sec. 128.12(1). Prohibits dismissal of proceedings except on notice to creditors in manner similar to that provided in Sec. 59(g) of Bankruptcy Act, 11 U. S. C., Chap. 6, Sec. 95.	Nothing comparable.
Sec. 128.12(2). Authorizes creditor to intervene when proceedings are not diligently prosecuted and compel expeditious administration or obtain dismissal.	Section 128.05 only gave a creditor a right to sue in the name of the assignee under certain conditions if assignee failed for 30 days to institute suit to vacate a fraudulent or preferential conveyance.
Sec. 128.14. Requires creditors to file a claim within three months in order to participate in any dividends, while the National Bankruptcy Act gives creditors six months. This section also provides for enjoining other proceedings by creditors as does the Bankruptcy Act. It is submitted that this is in effect a discharge provision.	Sec. 128.08. Merely permitted court to fix time for filing claims in *involuntary* (emphasis ours) proceedings.
Sec. 128.15(2). Limits the secured creditor's right to participate in dividends only to the extent as is due him	No comparable provision.

New Act.	*Old Act.*
over and above the value of his securities, the same limitation created by Sec. 57(h) of the Bankruptcy Act, 11 U. S. C., Chap. 6, Sec. 93.	
Sec. 128.17. Adopts the order of priority in payment of claims created by the Bankruptcy Act.	Sec. 128.16 provided for a less comprehensive classification of priorities and provided for payment in a different order.
Subsection (1)(d) places tax claims of the United States, the state and political subdivisions of the state in a class with equal rank but in practice it is generally conceded that the claims of the United States must first be paid in full under Title 31, U. S. Code, Sections 191 and 192.	
This section therefore is an invalid infringement of an Act of Congress other than the Bankruptcy Act.	
Sec. 128.18(1). Invalidates certain liens by legislating into the receiver the status of a creditor armed with process, a clear adaption of the "strong arm" provision of Sec. 70c of the Bankruptcy Act, 11 U. S. C., Chap. 7, Sec. 110, which confers upon the trustee by force of law as to the property of the bankrupt, the status of a judgment creditor holding an execution returned unsatisfied.	No comparable provision.

New Act.	*Old Act.*
Sec. 128.18(2). Subrogates the receiver to the rights of a creditor with an invalid lien. This is power legislated into the trustee by Sec. 67a(3) of the Bankruptcy Act, 11 U. S. C., Chap. 7, Sec. 107.	No comparable provision.
Sec. 128.18(5). Legislates into the receiver the right to recover preferential transfers made within four months of filing of the proceedings. This is a basic weapon of major importance given the trustee in bankruptcy by Sec. 60b of the Bankruptcy Act, 11 U. S. C., Chap. 6, Sec. 96.	No comparable provision.
Sec. 128.18(6). Avoids all "levies, judgments, attachments or other liens" obtained by legal proceedings within four months. This section is almost identical with the title given the trustee in bankruptcy by Sec. 67a(1) of the Bankruptcy Act, 11 U. S. C., Chap. 7, Sec. 107.	Sec. 128.07 only avoided attachments, levies or garnishments within ten days of filing.
Sec. 128.19(1). Vests in the receiver "by operation of law" title to debtor's non-exempt property as of the date of filing including that previously transferred in fraud of creditors. The substance of Section 128.19 of the present Act	No comparable provision.

New Act.

Old Act.

can be found in Section 70a of the National Bankruptcy Act, 11 U. S. C., Chap. 7, Sec. 110. One of the basic fundamentals of bankruptcy legislation as presently understood and as characterized by the National Bankruptcy Act, is a procedure to divest the debtor of title to all of his assets on hand, the title passing to a receiver or trustee, who under the direction of the court should liquidate them and distribute the proceeds. The phenomenon is that title is legislated out of the debtor and into the representative of the creditors for whom the statute provides. No conveyance is necessary. This is exactly what Section 128.19 does when it provides that the receiver upon his qualification shall be vested by operation of law with the title of the debtor in his property except that which is exempt. The rights and title vesting in a receiver appointed under this Act are substantially greater than those of an assignee under an assignment for the benefit of creditors.

Sec. 128.19(2). Legislates into the receiver the right to avoid any transfer of property which any creditor may have avoided.

Sec. 128.04 only permitted the receiver to avoid fraudulent or void conveyances.

The Court of Appeals for the Seventh Circuit in the case at bar decided the question involved as it did despite the fact that its decision is in direct conflict with the decision of the Court of Appeals for the Tenth Circuit. *First National Bank of Albuquerque* v. *Robinson*, 107 Fed. (2) 50.

In the above case a similar New Mexico Statute was held to be an insolvency act because it covered substantially the same field as the National Bankruptcy Act. The Court of Appeals for the Tenth Circuit at page 53 said:

> "By virtue of the constitutional authority of Congress to enact a uniform system of bankruptcy, the National Bankruptcy Act is paramount and superior to all state laws upon the subject, and all state insolvency laws are suspended in so far as they relate to the same subject-matter and affect the same persons as the National Bankruptcy Act. It follows that the receivership proceeding in the state court was void."

In addition to the conflict between the Seventh Circuit and the Tenth Circuit the court's attention is also invited to *In re Smith*, 92 F. 135, where a District Court suspended a State of Indiana Statute. At page 138, the Court said:

> "All matters embraced in the bankruptcy act must be controlled and governed by its provisions. Among these are the right and duty of the bankruptcy court to have insolvent estates settled in and by it, under and in accordance with the provisions of the bankruptcy act; to have acts of bankruptcy affecting the settlement of estates determined by it (section 3); to have the rights of debtors to file voluntary petitions, and of creditors to file involuntary petitions, determined by it (section 4); and to have liens and preferences governed by it (sections 60, 67). These and various other provisions of the bankrupt act affecting the conduct and rights of debtors and creditors are different from those found in the statute of this state touching general assignments. In my opinion, the

operation of the state law is suspended, and the state courts are without any jurisdiction or authority to administer the estates of bankrupts or insolvents."

In re Salmon & Salmon, 143 F. 395, the District Court of Missouri followed a similar rule.

A more recent case sustaining the basic position of the petitioner here is the case of *Pennsylvania* v. *Nelson*, 350 U. S. 497. This case involved a Pennsylvania statute which provided for punishment of sedition against the State of Pennsylvania and the United States of America.

The court quoted *Hines* v. *Davidowitz*, 312 U. S. 52, 67, as follows:

> "(t)his Court, in considering the validity of state laws in the light of • • • federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula."

and further said at page 502 that the test was:

> "*First*, (t)he scheme of federal regulation (is) so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."
>
> • • • • •
>
> "*Second*, the federal statutes 'touch a field in which the federal interest is so dominant that the federal system (must) be assumed to preclude enforcement of state laws on the same subject. • • •
>
> • • • • •
>
> "*Third*, enforcement of state sedition acts presents a serious danger of conflict with administration of the federal program. • • •"

and further at page 509, quoting *Garner* v. *Teamsters Union*, 346 U. S. 485, 490-491, said:

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

The court therefore held that the Smith Act, which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Statute which proscribes the same conduct.

It is submitted that the conflict created by the Pennsylvania sedition statute and the Wisconsin statute here challenged is identical.

To permit both the State and Federal government to act in the field of bankruptcy concurrently would create difficulties which would make the operation of the Federal Act as difficult as in the field of sedition.

2. The intent of the legislature to create an entire inseverable act is evident from its provisions. To invalidate certain provisions and to sustain others is to emasculate Chapter 128.

The Legislature of Wisconsin never intended Chapter 128 to be a voluntary assignment procedure, but the Legislature intended to utilize a voluntary assignment procedure as a condition precedent to invoking Chapter 128 of the Wisconsin Statutes and its insolvency provisions.

As the Court of Appeals in their Opinion, Appendix I, at page 31, cited the law on Severability:

> "(i)n cases coming from the lower federal courts, such questions of severability, if there is no controlling State decision, must be determined by this court."

Dorchy v. *Kansas*, 264 U. S. 286, 291.

Chapter 128 contained a severability clause, Wis. Statutes, Sec. 128.22 (1937), but the Wisconsin legislature removed the separate severability clauses from their various places in the statutes and enacted a general severability clause to eliminate the necessity for such clauses in separate acts and sections. Wisconsin Laws 1951, c. 261, Section 10. This clause provides the following rule of construction:

> "Construction of laws; rules for. In construing Wisconsin laws the following rules shall be observed unless construction in accordance with a rule would produce a result inconsistent with the manifest intent of the legislature:
>
> • • • • •
>
> "(11) Severability. The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application."

Wisconsin Statutes, c. 370, Sec. 370.001 (1951).

The Supreme Court of Wisconsin in referring to the severability clause of Chapter 199, Wis. Stats. said in the case of *State ex rel. Wisconsin Development Authority and Others* v. *Dammann, Secretary of State*, 228 Wis. 147, at page 198:

> "This clause (severability clause) is very broad and is entitled to great weight as an indication of legislative intent in determining whether the unobjectionable portions of the Act can stand. The clause, of course, is not conclusive, and *if so little of the act remains as not to leave a 'living, complete law capable of being carried into effect "consistent with the intention of the legislative which enacted it in connection with the void part"' it is the duty of the court to de-*

cline to sustain the act in part in spite of the separability clause. * * *" (Italics ours.)

See also *State ex rel. American Legion 1941 Conv. Corp.* v. *Smith*, 235 Wis. 443 at 463, and *Weco Products Co.* v. *Reed Drug Co.*, 225 Wis. 474 at 491.

To take out of the act all of the involuntary provisions would result in legislation having little resemblance to that passed by the legislature. This is not a proper application of severability. Certainly it cannot be argued that we can isolate from the present chapter anything substantially resembling the law as it was in effect at the time of the *Pobreslo* v. *Boyd Co.*, 287 U. S. 518.

3. The Court of Appeals in its Opinion referred to Section 2(a)(21) of the Bankruptcy Act, 11 U. S. C. Section 11(a)(21) (Appendix I, p. 33) to the effect that the Bankruptcy Court shall not require delivery of assets which are in the hands of a state court receiver which was appointed more than four months prior to the date of bankruptcy. This section we do not believe to be applicable in the present situation. The question involved relates to exclusive jurisdiction of the Bankruptcy Court when a state statute conflicts with the Bankruptcy Act. The Wisconsin Legislature in enacting Chapter 128 in its present form so substantially changed the character and purposes, powers and procedures of the earlier Act that it became a comprehensive and exclusive court administered system for the voluntary and involuntary administration of insolvent estates for the benefit of creditors. It became an act tantamount to a bankruptcy law. The act as indicated previously was modeled in essence after the National Bankruptcy Act. Consequently, the four months' provision referred to is not applicable since that section applies only to receivers appointed under valid state legislation, not to a receiver appointed under a state act which is in violation of the principles and provisions of Federal bankruptcy legisla-

tion under the United States Constitution, and as such is in conflict with and is suspended during the period in which the Federal Act is in effect.

The position taken by the Trustee in this matter and supported by the decision of the Referee in Bankruptcy, the United States District Judge, the City of Milwaukee and the State of Wisconsin is that the Act is inoperative because of the conflict and the four months' provision is meaningless.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Court of Appeals for the Seventh Circuit had in the case numbered and entitled on its docket, No. 11706, In the Matter of Wisconsin Builders Supply Co., Bankrupt, Paul L. Moskowitz, Receiver of Wisconsin Builders Supply Co. Appellant, *vs.* George D. Prentice, Jr., Trustee of Wisconsin Builders Supply Co., Appellant, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Court of Appeals for the Seventh Circuit be reversed by the court, and for such further relief as to this court may seem proper.

Dated April 19, 1957.

/s/ ROBERT M. CURLEY,
ROBERT M. CURLEY,
Attorney for Petitioner.

APPENDIX I.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 11706 September Term and Session, 1956.

In the Matter of
WISCONSIN BUILDERS SUPPLY CO.,
BANKRUPT

PAUL L. MOSKOWITZ, RECEIVER OF WISCONSIN BUILDERS SUPPLY CO.
Appellant,
v.
GEORGE D. PRENTICE, JR., TRUSTEE OF WISCONSIN BUILDERS SUPPLY CO.
Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

NOVEMBER 27, 1956.

Before FINNEGAN, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SWAIM, *Circuit Judge.* Chapter 128 of the Wisconsin Statutes (1951), regulates general assignments for the benefit of creditors and also contains provisions relating to involuntary proceedings against insolvent debtors. This appeal raises the question of whether the voluntary provisions of that chapter which relate to general assignments conflict with the National Bankruptcy Act and are therefore suspended while the federal law is operative.

On October 26, 1951, the Wisconsin Builders Supply Co. executed a general assignment for the benefit of its creditors to Paul L. Moskowitz, as assignee. The assignment was filed, pursuant to Chapter 128, in the Circuit Court for Milwaukee County on October 29, 1951, and Moskowitz was duly appointed receiver for the debtor and its assets. On June 6, 1952, the debtor filed a voluntary petition in the United States District Court for the Eastern District of Wisconsin praying that it be adjudged a bankrupt. An order of adjudication was duly entered on the same date. On July 14, 1952, the trustee in bankruptcy filed a petition with the referee requesting a turn over order to require Moskowitz, as state court receiver, to turn over all the assets of the bankrupt to the trustee in bankruptcy. At the hearing before the referee the receiver filed a special appearance on the ground that the District Court did not have jurisdiction. The referee found that Chapter 128 of the Wisconsin Statutes established a system of liquidation which possessed all of the characteristics of a bankruptcy law and therefore was in conflict with the National Bankruptcy Act; that the appointment of the receiver under this statute was void; and that the turn over order should issue. The District Court affirmed the order of the referee. *In re Wisconsin Builders Supply Co.*, 136 F. Supp. 439.

The Constitution of the United States gives Congress the power "to establish * * * uniform laws on the subject of Bankruptcies throughout the United States." U. S. Constitution, Art I. §8, Cl. 4. This clause did not obligate Congress to pass a federal bankruptcy law and during nearly two-thirds of the life of this nation we had no such act. Nor did this clause of the Constitution deny the power of the states to pass bankruptcy or insolvency laws. *Sturges* v. *Crowninshield*, 4 Wheat, 122. However, when Congress has exercised its constitutional power by enact-

ing bankruptcy legislation the power of Congress is paramount and state laws in competition with the subject matter covered by Congress are superseded. *Sturges* v. *Crowninshield, supra; Ogden* v. *Saunders,* 12 Wheat, 213; *Straton* v. *New,* 283 U. S. 318. The problem of permissible state legislation in respect to general assignments, such as we have before us, is admittedly difficult and requires a consideration of the scope of the Bankruptcy Act and of Chapter 128 of the Wisconsin Statutes.

Section 3 of the Bankruptcy Act, 11 U.S.C.A. §21(a)(4), makes a general assignment for the benefit of creditors an act of bankruptcy. It is clear that general assignments may be regulated by state statutes and supervised by state courts either exercising powers specifically conferred by statute or their traditional equity powers. *Pobreslo* v. *Boyd Co.,* 287 U. S. 518; *Johnson* v. *Star,* 287 U. S. 527; *Boese* v. *King,* 108 U. S. 379; *Mayer* v. *Hellman,* 91, U. S. 496. Of course, it is possible that state legislation may go so far as to change the general assignment into a state insolvency system in conflict with or covering the same subject matter as the Bankruptcy Act and where that occurs such legislation is held to be superseded by the paramount federal law. See *International Shoe Co.* v. *Pinkus,* 278 U. S. 261, where the Supreme Court held such an Arkansas statute suspended.

The legislation before us, Wis. Stat. c. 128 (1951), became law in 1937 when the previous Chapter 128, Wis. Stat. c. 128 (1935), was repealed. Wis. Laws 1937, c. 431, §1. In *Voluntary Assignment of Tarnowski,* 191 Wis. 279, 210 N. W. 836, the Wisconsin Supreme Court upheld the validity of the earlier act, although it declared a discharge provision superseded by the Bankruptcy Act. The same statute was again considered by the Wisconsin court in *Pobreslo* v. *Boyd Co.,* 210 Wis. 20, 242 N. W. 725; see also *Hazelwood* v. *Olinger Building Department*

Stores, 205 Wis. 85, 236 N. W. 591; and the court affirmed its position that the provisions of Chapter 128 were not in conflict with the federal act. This finding was upheld by the United States Supreme Court in *Pobreslo* v. *Boyd Co.*, 287 U. S. 518. The receiver urges that the present Chapter 128 is substantially a re-enactment of the provisions of the earlier act with the exception of the involuntary provisions and, since the previous law was upheld in the *Pobreslo* case, the present law is equally valid.

Before considering the provisions of Chapter 128 we shall first consider the argument of the receiver that since Chapter 128 does not contain a discharge provision it lacks one of the essential features of bankruptcy legislation. While much language in the cases indicates that a discharge provision is suspended and that great importance should be attached to this element in deciding whether state legislation is suspended, *e.g.*, *Pobreslo* v. *Boyd Co.*, 287 U. S. 518, 525-526; *International Shoe Co.* v. *Pinkus*, 278 U. S. 261, 265-266; *Stellwagen* v. *Clum*, 245 U. S. 605, 615-616; *Boese* v. *King*, 108 U. S. 379, 385, it is clear that the presence or absence of such a provision is not the sole test to be applied in this determination. See *Stellwagen* v. *Clum*, *supra*, at p. 616. The lower federal courts have frequently held that discharge is not an essential element of bankruptcy law and that state legislation may be suspended notwithstanding the absence of such a provision. *First Nat. Bank in Albuquerque* v. *Robinson*, 10 Cir., 107 F. 2d 50; *Hammond* v. *Lyon Realty* Co., 4 Cir., 59 F. 2d 592; *In re Schwartz Bros.*, 58 F. Supp. 761; *In re Weedman Stave Co.* (D. C.), 199 Fed. 948; *In re Salmon & Salmon* (D. C.), 143 Fed. 395; *In re F. A. Hall Co.* (D. C.), 121 Fed. 992; *In re Smith* (D. C.), 92 Fed. 135. Some of the emphasis on discharge as the criterion of a bankruptcy act is misguided. Historically, discharge has not been an inherent characteristic of bank-

ruptcy legislation in the United States. In fact the present Federal Bankruptcy Act is the first to permit discharge without some consent of the creditors of the insolvent. Further, as regards a corporate debtor such as we have here, discharge is frequently of no importance when it is noted that a general assignment or the appointment of a receiver is often a prelude to dissolution of the corporate entity.

If, as it appears, the presence or absence of a discharge provision is not the sole criterion of the invalidity or validity, respectively, of state legislation in the field presently covered by federal law, it is necessary to determine the element or elements which do control such a determination. In *International Shoe Co.* v. *Pinkus*, 278 U. S. 261, at p. 265, Mr. Justice Butler, speaking for a majority of the Court, said:

> "The national purpose to establish uniformity necessarily excludes state regulation. It is apparent, without comparison in detail of the provisions of the Bankruptcy Act with those of the Arkansas statute, that intolerable inconsistencies and confusion would result if that insolvency law be given effect while the national Act is in force. Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws. States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations."

This rather sweeping language does not mean that the Bankruptcy Act prevents a state from legislating with regard to the debtor-creditor relationship. In subsequent cases the Supreme Court, speaking through Mr. Justice Butler, held that state statutes regulating general assignments were not in conflict with the Bankruptcy Act. *Pobreslo* v. *Boyd Co.*, 287 U. S. 518, involving Wisconsin

law, Wis. Stat. c. 128 (1929); *Johnson* v. *Star*, 287 U. S. 527, involving Texas law, Tex. Rev. Civil Stat. tit. 12 (1925); and see the earlier cases, *Stellwagen* v. *Clum*, 245 U. S. 605; *Boese* v. *King*, 108 U. S. 379; *Mayer* v. *Hellman*, 91 U. S. 496. The making of a general assignment for the benefit of creditors and the procuring, permitting or voluntarily suffering the appointment of a receiver or trustee to take charge of debtor's property are acts of bankruptcy, 11 U. S. C. A. § 21(a)(4) and (5), which permit a requisite number of creditors to transfer the administration of the debtor's assets to the bankruptcy court, provided the action is timely and certain other requirements are met. This implies a recognition of possible alternatives to bankruptcy and that the creditors have a choice of administration, *i.e.*, either the assignee or receiver selected by the debtor or one selected and supervised under the provisions of the Bankruptcy Act. The question is not whether states may legislate at all, but rather how far may they go.

THE WISCONSIN ACT—Wis. Stat. ch. 128 (1951).

Section 128.01 provides that all assignments for the benefit of creditors shall be subject to the provisions of Chapter 128, and that the circuit courts shall have supervision of the proceedings under this chapter and may make all necessary orders and judgments therefor. The Supreme Court has expressly held that general assignments may be regulated by state statutes and supervised by state courts exercising powers specifically conferred by statute. *Pobreslo* v. *Boyd Co.*, 287 U. S. 518; *Johnson* v. *Star*, 287 U. S. 527; *Mayer* v. *Hellman*, 91 U. S. 496.

Section 128.02(1) provides that the assignee shall file the assignment in the appropriate court and deliver a bond to cover all property likely to come into his hands. Subsection (2) deprives all creditors of all remedies except as provided by Chapter 128 and provides a ratable

distribution to the creditors. Section 128.06 of the prior Chapter 128, upheld in *Pobreslo* v. *Boyd Co., supra,* provided that voluntary assignments were void as against creditors unless the assignee filed the proceedings in court and gave bond. That section contained language almost identical to Section 128.02(2) of the present Wisconsin Act. See *Mayer* v. *Hellman,* 91 U. S. 496.

Section 128.05(1) makes it mandatory that the assignee shall file the assignment with the court; that the circuit court shall, upon the filing of the assignment, designate a receiver, or order a meeting of creditors for the purpose of electing a receiver who apparently need not be the assignee of the debtor, although in the instant case the assignee was appointed receiver.

Section 128.06 of the prior act provided, in part, that a voluntary assignment was void as against creditors unless filed with the court. There was no comparable provision requiring the court to designate a receiver or permitting the court to order a meeting of creditors for the purpose of electing a receiver.

Section 128.06(1) provides for the commencement of involuntary proceedings against an insolvent who within the preceding four months has committed one of five enumerated acts, which acts are five of the six acts of bankruptcy defined in the Bankruptcy Act, 11 U.S.C.A. § 21, i.e., (1) fraudulent transfer or concealment of property; (2) preferential transfer; (3) suffering or permitting any creditor to obtain a lien through legal proceedings; (4) fraudulent or collusive assignment for the benefit of his creditors; (5) admission in writing of his inability to pay debts and his willingness to be adjudged insolvent. Subsections (2) and (3) provide for hearings on the petition. Subsection (4) provides that the assignee under a voluntary assignment not previously filed under the provisions of Chapter 128 shall upon petition of any creditor, without

proof of the insolvency of the assignor be required to file the assignment and comply with the provisions of Chapter 128.

Section 128.08 of the prior act provided that if an insolvent debtor should confess judgment or do any act or make any conveyance whereby one or more of his creditors should obtain a preference or should fail to prevent a preference or if he should not, within ten days after any levy by attachment, execution or garnishment, make an assignment of all his property, or within such time in good faith institute proceedings to vacate the attachment, execution or garnishment, or secure a release thereof, any two or more creditors holding and owning debts of not less than $200 may make a petition to the circuit court, and the court shall then proceed summarily upon such petition and if it shall appear that the debtor is insolvent and has given a preference the court shall appoint a receiver who shall take possession of the debtor's property, convert the same into money and distribute it *pro rata* among the creditors.

The new section is much broader in scope than the old section and is as broad and comprehensive as Section 3 of the Bankruptcy Act, 11 U. S. C. A. §21. There is no doubt that Section 128.06 is suspended because it is in conflict with the subject matter covered by the federal law. *Straton* v. *New*, 283 U. S. 318; *International Shoe Co.* v. *Pinkus*, 278 U. S. 261; *First Nat. Bank in Albuquerque* v. *Robinson*, 10 Cir., 107 F. 2d 50.

Section 128.08(1) gives the court power to sequestrate the property of a debtor and appoint a receiver therefor when a petition under Section 128.06 shall be filled and when an execution against a domestic corporation is returned unsatisfied in whole or in part and subsection (2) provides that in either of such cases the court may appoint a custodian to take possession and may provide for

a meeting of creditors to elect a receiver. In so far as Section 128.08 is interrelated with Section 128.06 it is subject to the same objection as this latter section.

Section 128.10(1) provides that the court may afford opportunity for hearings and meeting of creditors to elect a receiver or to pass upon matters submitted to creditors by a majority vote in number and amount of claims. The prior act had no provision for creditors' meetings.

Section 128.12(1) provides that proceedings once commenced may not be dismissed by consent of parties, except after notice to all creditors and a hearing thereon. Subsection (2) provides that if proceedings are commenced and not diligently prosecuted or are delayed, any creditor may intervene for the purpose of continuing the administration or obtaining a dismissal. The prior act does not contain anything comparable to subsection (1). However, in the absence of statute, an assignment for the benefit of creditors is an absolute appropriation of the assignor's assets for their benefit and he surrenders all right and control over the property subject to the assignment. See 6 C. J. S. Assignments for Benefit of Creditors §1. Therefore, this provision of the act is not objectionable.

Section 128.05 of the prior act provided that if an assignee should neglect for thirty days to institute a suit to vacate a fraudulent or preferential conveyance, any creditor might institute such suit in the name of the assignee upon complying with certain conditions.

Section 128.18(1) provides that claims which for want of record or for other reasons would not have been valid liens as against creditors of the debtor armed with process shall not be liens against the estate; subsection (2) subrogates the receiver or assignee to the rights of

creditors against the liens created by the debtor for the benefit of the estate; subsection (3) dissolves liens created within four months before the commencement of the proceedings if the lien is preferential or created by fraud; subsection (4) protects liens given in good faith and for present consideration; subsection (5) avoids transfers and liens created within four months prior to the filing of a petition or assignment with intent to hinder, delay or defraud creditors and provides that they shall be null and void against the creditors; and subsection (6) dissolves levies, judgments and attachments or other liens obtained through legal proceedings against an insolvent debtor within four months.

Section 128.02 of the prior act provided that every levy of an execution under a judgment obtained within sixty days prior to an assignment and the lien of such judgment on real estate shall be void, and that every lien created by the debtor within sixty days prior to the making of an assignment shall be void if the person benefited had reasonable cause to believe the debtor was insolvent. Section 128.03 gave the assignee the power necessary to institute any action or proceeding to avoid and set aside any such levy, sale or lien. Section 128.04 provided that the assignee shall represent the creditors, and the right to avoid any transfer or conveyance which would be fraudulent or void as to creditors was vested in the assignee. Section 128.07 provided for dissolution of attachments, levies, garnishments or other process made within ten days prior to an assignment or receivership.

Section 128.19(1) provides that the receiver or assignee upon qualification shall be vested by operation of law with title of the debtor as of the date of the filing of a petition or assignment except in so far as it is property which is exempt. Subsection (2) provides that the receiver or assignee may avoid any transfer by the debtor

of his property which any creditor might have avoided and recover the property or its value from the transferee unless he was a bona fide purchaser prior to the filing of a petition or assignment. Section 128.08 of the prior act provided that upon appointment the receiver shall take possession of all the debtor's property attached, levied upon and conveyed in fraud of creditors, and have charge and control of same and convert same into money and distribute the same *pro rata* among the creditors. In case of a voluntary assignment title to the debtor's property was vested in the assignee by virtue of the contract of assignment. See 6 C. J. S. Assignment for Benefit of Creditors §10. Section 128.04 gave the assignee the right to avoid fraudulent conveyances and transfers.

Those sections of Chapter 128 which have not been compared in detail with the prior act are either substantially identical in purport with their predecessors or present differences which we do not believe significant with respect to the problem presented by this case.

A comparison of the provisions of Chapter 128 with those of the prior act compels a conclusion that Chapter 128, except for the involuntary provisions, is substantially a re-enactment of the earlier law. We fail to find any significant departures which would cause Chapter 128 to be legislation "tantamount to bankruptcy." There is little that is new. The character and purpose of the Act is the same, *i. e.*, judicial supervision of general assignments for the benefit of creditors. The powers and procedures have been altered somewhat, but not in any significant respect, *e.g.*, Section 128.05 permits the court to designate a receiver who need not be the assignee under the assignment; Section 128.10 permits the court to provide for hearings and meetings of creditors to elect a receiver or to pass upon matters submitted to cred-

itors; Section 128.12 provides that proceedings once commenced may be dismissed only after a hearing on notice to all creditors; Section 128.15 provides that secured creditors may participate in the proceedings and file claims for such amount as their claims exceed the value of their security; Section 128.19 "legislates" title out of the debtor and into the receiver or assignee; Section 128.04 redefines insolvency and Section 128.17 establishes a new order of distribution—both sections employing language similar to that in the Bankruptcy Act. These changes are consistent with a regulatory scheme of general assignments and their purpose would appear to be to afford the mechanics for more efficient collection, administration and distribution of the debtor's assets. See *Mayer* v. *Hellman*, 91 U. S. 496, 500-501; Rieselbach, Sequestration for the Benefit of Creditors, 23 Marq. L. Rev. 59 (1939). Chapter 128 is an expansion of the prior Wisconsin general assignment legislation but it has not been turned into a system of insolvency administration opposed to the Bankruptcy Act, at least, as concerns its voluntary provisions. This was impliedly recognized by the District Court when it said:

> "All of these sections of Chapter 128 which were created by Chapter 431 of the Laws of 1937 constitute with the the 1939 amendments a comprehensive system covering both voluntary and involuntary actions. The provisions generally apply to both voluntary and involuntary actions and the Act does not lend itself to the application of the doctrine of severability. * * * To take out of the Act all of its involuntary phases would result in legislation having little resemblance to that passed by the legislature." *In re Wisconsin Builders Supply Co.*, 136 F. Supp. 439, 451.

Having decided that the voluntary provisions of Chapter 128 are not objectionable, it becomes necessary to

consider the centention of the receiver that the involuntary provisions may be severed from the Act. The District Court was of the opinion that the Act does not lend itself to the application of the doctrine of severability. It is true, as noted by the District Court, that a proceeding which commences as a voluntary one may be turned, in effect, into an involuntary proceeding as where the assignment is not filed, Section 128.06(4), or where the action is not prosecuted diligently, Section 128.12(2). However, under the prior act voluntarly assignments were void as against creditors unless the assignee filed the proceedings in court, Section 128.06, and, as noted above, in the absence of statute, an assignment for the benefit of creditors is an absolute appropriation of the assignor's assets for their benefit and the debtor surrenders all right and control over the property subject to the assignment. Whether the involuntary provisions are so interwoven with the regulatory scheme of Chapter 128 that they cannot be severed without destroying the efficacy of the remaining portions of the Act is a question of interpretation and legislative intent. This determination is more appropriately one for the state courts of Wisconsin. *Skinner* v. *Oklahoma,* 316 U. S. 535. However, "[i]n cases coming from the lower federal courts, such questions of severability, if there is no controlling state decision, must be determined by this Court." *Dorchy* v. *Kansas,* 264 U. S. 286, 291.

Chapter 128 contained a severability clause, Wis. Stat. §128.22 (1937), but the Wisconsin legislature removed the separate severability clauses from their various places in the statutes and enacted a general severability clause to eliminate the necessity for such clauses in separate acts and sections. Wis. Laws 1951, c. 261, §10. This clause provides the following rule of construction:

"Construction of laws; rules for. In construing

> Wisconsin laws the following rules shall be observed unless construction in accordance with a rule would produce a result inconsistent with the manifest intent of the legislature:
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> "(11) Severability. The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application." Wis. Stat. c. 370, §370.001 (1951).

Section 370.001(11) provides a rule of construction which may aid in this determination, "[b]ut it is an aid merely; not an inexorable command." *Dorchy* v. *Kansas, supra,* at p. 290. And it does not appear necessary to ground our conclusion as to severability on Section 370.001(11). See *Muench* v. *Public Service Comm.,* 261 Wis. 492, aff'd on rehearing at p. 515b, 515p; 53 N. W. 2d 514, aff'd on rehearing 55 N.W. 2d 40, 47-48. We are of the opinion that the involuntary provisions of Chapter 128 may be severed; that this was the intent of the Wisconsin legislature; and that the remaining provisions of the Act can be given effect without the invalid provisions. No portion of the voluntary provisions is dependent upon the involuntary provisions, and they are distinct and separable from these latter provisions.

Only one last point need be considered. The receiver urges that a subsequent memorandum opinion by Judge Tehan, the judge below, in *In the Matter of Supreme Tool and Manufacturing Co.,* No. 56-B-52, decided October 4, 1956, is inconsistent with and, in effect, is a reversal of his decision in this case. In the *Superior Tool* case the alleged bankrupt duly executed a voluntary assignment

for the benefit of creditors pursuant to Chapter 128. The assignee accepted the assignment and complied with the provisions of Chapter 128. More than four months subsequent thereto, creditors of the alleged bankrupt filed an *involuntary* petition in bankruptcy with the District Court. The state court receiver and the alleged bankrupt filed motions to dismiss on the grounds that no act of bankruptcy within the four-month period was alleged and that, consequently, the District Court was without jurisdiction. The motions were granted. The case is clearly not in point.

In the instant case we have a nonbankruptcy receiver who was appointed more than four months before the filing of the voluntary petition. Section 2(a)(21) of the Bankruptcy Act, 11 U.S.C.A. §11(a)(21), expressly provides that the bankruptcy court shall not require delivery of assets which are in the hands of a state court receiver who was appointed more than four months prior to the date of bankruptcy.

The judgment is reversed and the cause remanded to the District Court with instructions to order the trustee in bankruptcy to return to the state court receiver all assets, if any, of the debtor, Wisconsin Builders Supply Co., in his possession or control.

REVERSED AND REMANDED.

APPENDIX II.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

Monday, February 4, 1957.

Before:

Hon. F. Ryan Duffy, Chief Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.
Hon. H. Nathan Swaim, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.

In the Matter of
Wisconsin Builders Supply Co.,
Bankrupt.

Paul L. Moskowitz, Receiver, etc.,
Appellant,
No. 11706 *vs.*
George D. Prentice, Jr., Trustee, etc.,
Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

It is ordered by the Court that appellee's petition for rehearing and his further petition for rehearing *en banc*, be, and the same are hereby, DENIED.

APPENDIX III.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

Monday, February 4, 1957.

Before:

Hon. Philip J. Finnegan, Circuit Judge.
Hon. H. Nathan Swaim, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.

In the Matter of
Wisconsin Builders Supply Co.,
Bankrupt.

Paul L. Moskowitz, Receiver, etc.,
Appellant,
No. 11706 *vs.*
George D. Prentice, Jr., Trustee, etc.,
Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

It is ordered by the Court that the petition of counsel for the Industrial Commission of Wisconsin and the City of Milwaukee for leave to file briefs as *amicus curiae* in connection with the appellee's petition for rehearing be, and the same is hereby, DENIED.

APPENDIX IV.

CHAPTER 128. (Wis. Stats. 1935)
Voluntary Assignments.

128.01 *Supervision of.* The circuit court or the judge thereof in vacation shall have supervision of the proceedings in all voluntary assignments made under the provisions of this chapter and may make all necesary orders for the execution of the same.

128.02 *Executions, judgment notes, preferences void.* Every levy of an execution made under a judgment confessed against an insolvent debtor within sixty days prior to his making an assignment for the benefit of creditors or under a judgment entered on a judgment note made by any such debtor within sixty days prior to his making such an assignment and the lien of any such judgment upon real estate shall be void and of no effect. Every sale, mortgage, hypothecation, lien or other security, or whatever name or nature, made, given or executed of or upon the real or personal property of any such debtor within sixty days prior to the making of such an assignment and in contemplation of the making thereof or of his insolvency shall be void and of no effect if the vendee in such sale or the person benefited thereby or by the execution of the mortgage, hypothecation, lien or other security knew or had reasonable cause to believe that such debtor was insolvent. All such assignments which shall contain or give any preference to one creditor over another, except for the wages of laborers, servants and employes earned within six months prior to the making thereof, shall be void as to the preference, but valid for all other purposes. Such void preferences shall be invalid as well in respect to creditors proving under the assignment as all others objecting thereto.

128.03. *Powers of assignee; traverse; preference; rights of creditors; inspection of books; evidence.* The assignee shall possess all the power necessary to institute any action or proceeding to set aside and avoid any levy, sale, mortgage, hypothecation, lien or other security made, given or executed contrary to the provisions of the preceding section; and if any writ of attachment shall be levied upon the property of the assignor within sixty days prior to the execution of such assignment the assignee may appear in the action in which it issued and in the name of the assignor traverse the affidavit of attachment or any part thereof, and the verification of the answer traversing such affidavit shall be sufficient if made upon information and belief. A judgment obtained, an attachment levied or a garnishment made in collusion with a debtor shall be deemed a security given by him within the meaning of this section. All costs and expenses incurred by the assignee in any such action or proceeding shall be paid out of the estate of the assignor after the allowance thereof by the court, which may exercise its discretion in allowing the same. If the assignee shall neglect for sixty days after the execution of the assignment to institute an action or proceeding as herein provided any creditor of the assignor who has duly proved his claim, whether entitled to participate or not, may institute and prosecute to judgment any such action or proceeding in the name of the assignee and for his benefit, upon executing to the latter a bond in the sum of one thousand dollars, with two or more sureties, freeholders of this state, conditioned to hold said assignee harmless from any loss, cost or expenses which will reresult by the determination of the action or proceeding adversely to him. If there shall be a recovery the creditor who prosecutes the action or proceeding shall be allowed out of the estate all reasonable costs and charges paid or incurred therein, which shall be fixed by the court. The as-

signee or any such creditor may, upon application to the proper circuit judge, the county judge or a court commissioner of the county where the assignment is filed, have an order for the inspection of the books of the assignor and his examination and that of other witnesses upon oath before the officer issuing such order as to the business affairs and condition of the assignor before and after the making of the assignment as to all matters pertaining to the assigned property and the assignor's indebtedness. The parties named in such order, after service of a copy thereof, shall attend at the time and place mentioned therein and submit to such examination, and their attendance may be compelled in the manner provided by law. If such examination is held at the instance of the assignee the expense thereof shall be chargeable to the estate; otherwise at the expense of the creditor or the estate as the officer before whom it is held shall determine and certify that it was instituted for the benefit of the creditors of the assignor or for other reasons.

128.04 *Rights of assignee to maintain action to avoid fraudulent conveyances.* In all cases of voluntary assignment for the benefit of creditors made under the provisions of the laws of this state the assignee or assignees shall be considered as representing the rights and interests of the creditors of the debtor or debtors making the assignment, as against all transfers and conveyances of property and all liens or charges thereon which would be held to be fraudulent or void as to creditors and shall have all the rights which such creditors would have to bring and maintain an action to avoid said fraudulent conveyances and transfers.

128.05 *When an assignee neglects to bring action, rights of creditor; bond, etc.* Whenever any insolvent debtor has made any conveyance or transfer of his property, with the intent to hinder, delay or defraud his creditors, or has

made or suffered any conveyance, transfer or charge upon his property, which is void, by reason of being preferential or otherwise, and shall thereafter make a general assignment for the benefit of his creditors; it shall be lawful for such assignee or his successors to commence and prosecute to judgment any proper suit or suits to vacate such fraudulent conveyance, transfer or charge. If the assignee named in such assignment or his successor, shall neglect for thirty days after the making thereof, to institute proper suit or suits to vacate such fraudulent or preferential conveyance, transfer or charge, it shall be lawful for any creditor of the assignor to institute and prosecute to judgment any such suit in the name of the assignee and for his benefit, upon giving to the assignee a bond in the sum of not less than five hundred dollars with sufficient surety resident of this state to hold the said assignee harmless from all costs or expenses to arise or accrue to him in case said suit shall be decided adversely to him; said bond to be approved by the judge of the court in which such action is to be brought. In case of recovery in such action the creditor so prosecuting the same shall be allowed out of the estate all reasonable costs and charges which he has paid or become liable to pay in prosecution of such suit or suits; such costs and expenses to be determined by the court.

128.06 *Assignment, how executed; bond; mistakes; amendments; ratable distribution.* All voluntary assignments or transfers whatever of any real estate, chattels real, goods or chattels, rights, credits, moneys or effect for the benefit of or in trust for creditors shall be void as against the creditors of the person making the same unless the assignee shall be a resident of this state and shall, before taking possession of the property assigned and before taking upon himself any trust conferred upon him by the instrument of assignment, deliver to the county judge or court commissioner of the county in which such as-

signor or some one of the assignors at the time of the execution of such assignment shall reside, not being a creditor of such assignor, a bond duly executed to the clerk of the circuit court of the county by his name of office as obligee in a sum not less than the present value of the assets of such assignor, which value shall be ascertained by the oath of one or more witnesses and of the assignors, with two or more sufficient sureties, freeholders of this state, who shall each testify to his responsibility and by their several affidavits satisfy the officer taking such bond that the property of such sureties, being within this state, is worth in the aggregate the sum specified therein; and the bond shall be conditioned that such assignee shall faithfuly discharge the several trusts reposed in him by such assignment and diligently and faithfully collect and reduce to money the property assigned to him and account for and pay over to the several parties, then being creditors of the assignor, all moneys that shall come into his hands from the effects of such assignor after deducting the necessary expenses of performing the several trusts mentioned in the assignment, as settled and allowed by the circuit court, and abide the order of said court. But no assignment shall be void because of any defect, informality or mistake therein or in the bond, inventory or list of creditors accompanying the same; and the court or judge may direct the amendment of the assignment or of any other such paper to effect the intention of the assignor or assignee, and any such amendment shall relate back to the time of the execution of the paper to which it is made. No mistake in filing a copy instead of an original or any like mistake or inadvertent failure to comply with the provisions of this chapter shall avoid the assignment. No creditor shall, in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, or in case of the insolvency of any debtor, by attachment, garnishment or otherwise, obtain

priority over other creditors upon such assignment being for any reason adjudged void, or in consequence of any sale, lien or security being adjudged void; but in all such cases the property of such insolvent debtor shall be administered for the ratable benefit of all his creditors under the direction of the court by the assignee or by any receiver of said property and estate appointed as hereinafter provided.

128.07 *Attachment; assignment.* Whenever the property of an insolvent debtor is attached or levied upon by virtue of any process in favor of a creditor or a garnishment is made against such a debtor he may, within ten days thereafter, make an assignment of all his property and estate, not exempt, for the equal benefit of all his creditors, whereupon all such attachments, levies, garnishments or other process shall be dissolved and the property attached or levied upon shall be turned over to such assignee or receiver.

128.08 *Preferences; receivership.* When any debtor, being insolvent, shall confess judgment or do any act or make any conveyance whereby one or more of his creditors shall obtain a preference over any other of his creditors or shall omit to do any act which he might lawfully do to prevent any of his creditors from obtaining preference over his other creditors, contrary to the intent of this chapter, or if he shall not, within ten days after any levy by attachment, execution or garnishment made against him, make an assignment of all his property, as provided in the next foregoing section, or within such time in good faith institute proceedings to vacate the attachment, execution or garnishment, or secure a release of such levy or defend against the said levy, then, or within thirty days thereafter, any two or more of his creditors holding and owning debts or claims of not less than two hundred dollars in the aggregate may make a petition to the circuit court or a judge thereof in

the county or circuit where such debtor resides, if a resident of this state, and if not, in any county thereof, setting forth therein such matters and facts as may be pertinent, and after notice given in such manner as the court or judge may direct to the debtor and creditors sought to be preferred or to their attorney of record, of the time and place of hearing, the court in term time or a judge in vacation shall proceed summarily upon such petition to hear the parties and receive such evidence as may be proper, and if it shall appear to the court or judge that the debtor is insolvent and has given a preference to any of his creditors over other of his creditors or any of them, or has refused or neglected to make an assignment of his property as hereinbefore provided, the court or judge shall appoint a receiver who shall take possession of all the debtor's property, evidences of property or indebtedness, books, papers, debts, choses in action and estate of every kind, including property attached or levied upon or garnished in the manner and subject to the limitations herein provided and of all property conveyed in violation of the provisions of this chapter, and have charge and control of the same, and of all debts or property garnished, except property exempt by law, and convert the same into money and distribute the same pro rata among the creditors having valid claims due or to become due who shall prove their claims within such time and manner as the court or judge shall direct; and the court or judge shall order the debtor to file a correct inventory of his assets and a list of his creditors as provided in section 128.13; such receiver shall be appointed and all proceedings shall be had under these statutes relating to receivers, and the court or judge may order or direct such debtor to do or refrain from doing whatsoever is necessary and proper to carry this chapter into effect. The provisions of this chapter shall not apply to any payment or satisfaction, in whole or in part, of a

past-due debt made in the usual course of business without any intent on the part of the creditor to evade the same. The same proceedings may be taken and with like effect under the provisions of this section by such insolvent debtor for a discharge from his indebtedness as if said debtor had made a voluntary assignment under this chapter.

128.09 *Definition of insolvency; time.* An insolvent person, within the meaning of this chapter, is one whose non-exempt property is insufficient in amount, at a fair valuation, to pay his debts; and when insolvency is to be inquired into, with reference to this chapter, it shall be determined as of the date of the making or attempting to make an assignment or of the giving or attempting to give any preference prohibited hereby, the issuing of an execution or attachment or the institution of garnishment proceedings against the debtor's property.

128.10 *Provisional remedies.* In all actions authorized by this chapter appropriate provisional remedies may be had and final relief administered to the equal distribution of all assets recovered among the creditors of the debtor, and the court may make such orders for the payment of costs and expenses as may be just. An action or proceeding authorized herein for the benefit of all creditors may be taken by a creditor although his demand is not due at the commencement thereof.

128.11 *Filing bond; new bond.* Such bond shall, immediately after its execution, together with a full and true copy of such assignment, to filed by the officer taking the same in the office of the clerk of the circuit court to whom it is executed; and the taking and filing of said bond by said court commissioner or county judge shall be deemed a sufficient approval thereof, and all bonds so taken and filed are hereby declared to be sufficiently approved. Such bond and copy of assignment shall be kept by such clerk in his office, subject at all time to the inspection of all

parties interested; and any creditor of the assignor may maintain an action thereon in the name of the obligee at any time for condition broken, and any judgment rendered thereon shall be held and collected for the benefit of the respective creditors of the assignor according to law and the terms and conditions of such assignment. The court may, from time to time, require the assignee to furnish a new or additional bond.

128.12 *Assignee's consent, how shown.* The assignees named in such assignment shall each, in the presence of the officer taking such bond, before delivering the copy of such assignment to said officer for the purpose specified in the preceding section, indorse in writing on such copy their consent to take upon themselves the faithful discharge of the several trusts specified in the assignment, and that the said copy so indorsed by them is a true and correct copy of the original; and such officer shall indorse thereon his certificate that the same is a true copy of the original and of the whole thereof, and that the said assignees named in such original assignment did in his presence make the indorsement thereon as required by this section. Said true copy so indorsed, or a duly certified copy thereof may be recorded in the office of the register of deeds of any county wherein lands are conveyed by such assignment in the same manner and with the same effect as other conveyances; and any such record heretofore made is hereby declared to be and to have been legal and valid, and shall be receivable in evidence with the same force and effect as the record of other conveyances.

128.13 *Inventory of assets.* Within twenty days after the execution of the assignment the assignor shall also make and file in the office of said clerk a correct inventory of his assets and a list of his creditors, stating the place of residence of each such creditor and the amount due to each, which inventory and list shall each be verified by his oath

and have affixed a certificate of the assignee that the same is correct according to his best knowledge and belief; but no mistake therein shall invalidate such assignment or affect the right of any creditor.

128.14 *Notice to creditors.* Within Twenty-two days after the execution of the assignment the assignee shall give notice of the making thereof and of his post-office address and that every creditor of such assignor is required to file, within three months, with such assignee or the clerk of the circuit court, naming him and his post-office address, on pain of being debarred a dividend, and affidavit setting forth his name, residence and post-office address, the nature, consideration and amount of his debt claimed by him, over and above all offsets. Such notice shall be given by publishing the same once in each week for three successive weeks in a newspaper in the county, or, if none, in an adjoining county, and by mailing a copy of such notice to each creditor at his residence of whom the assignee shall have information.

128.15 *Proof of notice; objections to claims; appeal; bill of exceptions.* At the expiration of three months from the first publication of such notice the assignee shall file with such clerk proof of the publication and a list of the creditors to whom such notice was mailed, with the dates thereof respectively, verified by his affidavit; and also a list of the creditors from whom affidavits of claims have been received by himself or such clerk, stating their names, residences and amounts claimed respectively, together with all affidavits of claims by him received. At any time within thirty days after such list is filed the assignee or any creditor may file written objections, specifying the grounds thereof, to the whole or any part of any debt claimed by any creditor, and serve a copy thereof upon such creditor as a summons of the circuit court is served, if a resident of this state, and in other cases in such manner as shall be fixed

by order of the court or a judge thereof. Depositions may thereafter be taken as in civil actions. The circuit judge on application of either party shall fix by order a time when such objections shall be heard by the court or such judge, which shall be served as therein prescribed on the other party, and may from time to time adjourn the hearing, and may in his discretion award a trial by jury. Upon the final hearing the court or judge shall make such order as shall be just, and may compel the payment of costs in the discretion of the judge. An appeal may be taken from such order within thirty days from the entry thereof, but not afterwards, in the manner provided for taking appeals from orders in civil actions, and a bill of exceptions may be settled thereon as in other cases.

128.16 *Creditors, when barred; what debts provable, how paid; taxes; labor.* Every creditor of the assignor who shall not file such an affidavit of his claim within the time limited as aforesaid shall not participate in any dividends made before his claim is filed. Debts to become due as well as debts due may be proved, a rebate of interest being made to the time of dividend on such as do not bear interest and interest being computed, when demandable, upon others to the time of dividend. The assignee may pay, or the court may order a dividend to be paid, at any time, making such provision as shall be necessary for the protection of claims in dispute. But before making any dividend the assignee shall pay all taxes assessed upon the property assigned, which remain unpaid, and the compensation due all laborers, servants and employes for labor or personal services performed for the assignor within the six months next preceding the making of the assignment, the claims for which shall be paid by him next after the payment of unpaid taxes and assessments, debts due the United States or this state, the expenses of the assignment and the execution of the trust.

128.17 *Settlement of assignee's accounts.* Every assignee who shall accept the assignment of any property under the provisions of this chapter or who has heretofore accepted his trust and has not settled the same shall, within six months thereafter or within such further time, not exceeding one year, as the court or judge shall allow, file with the clerk a full and itemized statement, verified by his oath, of the property by him received, the manner of his dealing therewith, the amount of money realized by him, the condition of the property and funds in his possession, the names and residences of the assignor's creditors, the dividends paid them, his receipts and disbursements, with his claim for compensation; provided, that if the court or judge shall decide that special reasons for further delay exist the time for such settlement may be further extended as the court or judge may order. If any such assignee shall neglect so to do or to promptly apply for a settlement of his account the court or judge may, upon application of any such creditor, compel the making and filing of such account or settlement thereof by order, and in such case the assignee may be denied, in the discretion of the court or judge, any compensation. Upon filing such report such assignee may apply to the court, upon not less than twenty days' notice thereof by mail to the respective creditors named therein, for a final settlement of such account; and at the time and place named the circuit court shall hear any objections made by any creditor, take such evidence as may be proper, and settle and adjust such accounts and the compensation and expenses of such assignee, whether objection be made or not, as shall be just; and his order thereupon shall be conclusive upon all parties, including the sureties of the assignee; but the assignee or any creditor may cause a bill of exceptions to be settled and appeal from such order within six months from the entry thereof to the supreme court in the manner prescribed for appeals in civil actions, except that the assignee may file

his notice and undertaking with the clerk without other service thereof. At any time after the expiration of three months from the publication of the notice mentioned in section 128.15 the assignee may file with the court a receipt in full or release executed by all the creditors of the assignor who have filed an affidavit or proof of their claims as required by section 128.14, up to the time of such application, together with the written consent of the assignor, and apply to the court for his discharge as assignee, which application shall be granted; and the court shall make an order requiring the assignee to deliver all property held by him as such assignee to the assignor, provided the assignor shall pay his fees and expenses and the costs of court, and thereupon the assignee shall be released and discharged from all liability to the creditors of the assignor for any moneys or property coming to his hands as such.

128.18 *Removal of assignee.* The circuit judge may, upon notice and after a hearing, remove any assignee who is shown to be incompetent, or to have become disqualified, or to have wasted or misapplied any of the trust estate, and shall also remove any such assignee upon the application of a majority of the creditors of such assignor who shall also represent a majority in value of the debts against said estate, and compel by order a settlement of his account and surrender of the estate to his successor, and shall appoint the person named in such petition or some suitable person as his successor, who shall qualify in the same manner provided by law for the assignee appointed by the instrument of assignment; and in place of any assignee who shall die or be removed may appoint another, who shall give like bond and be subject to like duties and responsibilities as to the estate remaining undisposed of and proceedings remaining to be taken as if appointed by the instrument of assignment.

NOTE:—Sections 128.19 to 128.29 inc. contain provisions for discharge, held unconstitutional in *In Re Tarnowski.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. 989

IN THE MATTER OF
WISCONSIN BUILDERS SUPPLY CO.,
BANKRUPT.

GEORGE D. PRENTICE, JR., TRUSTEE OF WISCONSIN BUILDERS SUPPLY CO.,
Petitioner,

vs.

PAUL L. MOSKOWITZ, RECEIVER OF WISCONSIN BUILDERS SUPPLY CO.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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WISCONSIN BUILDERS SUPPLY CO.,

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vs.

PAUL L. MOSKOWITZ, RECEIVER OF WISCONSIN BUILDERS SUPPLY CO.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent, Paul L. Moskowitz, as State court receiver of Wisconsin Builders Supply Co. opposes the issuance of a Writ of Certiorari in the present case upon the following grounds:

1. The decision of the Court of Appeals for the Seventh Circuit in the present case establishes no new principles of law, but merely applies long established principles and precedents.

2. The decision of the Court of Appeals for the Seventh Circuit with reference to the Federal questions involved

is in accord with applicable decisions of the Supreme Court of the United States and the decisions of other Federal Courts of Appeals.

3. The difference between the result reached by the District Court and the result reached by the Court of Appeals in the present case arises from differences in their respective interpretations of (a) the extent of the 1937 revision of Chapter 128 Wisconsin Statutes and (b) the applicable principles of Wisconsin law involved in its construction. The first of these differences is a question of fact, and the second is a question of applicable State Law. Neither difference arises from a Federal question of law.

ARGUMENT.

1. The Decision of the Court of Appeals for the Seventh Circuit Establishes No New Principles of Law.

It will be noted that the decision of the Court of Appeals does not purport to establish any new principles of law. In fact, analysis of the decision will indicate that the Court of Appeals cited and relied on a great many cases which have previously been decided by the Supreme Court of the United States. In its decision (Appellant's Appendix, Pages 20 to 24 inclusive), the Court of Appeals cited and relied on every one of the leading cases decided by the Supreme Court of the United States with reference to problems involving so-called conflicts between State insolvency statutes and the Federal Bankruptcy Act. The Court of Appeals' decision also refers to the bankruptcy cases relied on by appellant in his petition for certiorari (App. app. p. 22). This indicates that the Court of Appeals did not overlook any of the pertinent authorities, but reached its conclusion after careful study and analysis of the controlling authorities, and based its decision on the principles established in those cases.

It is apparent, from study of the decision, that the Court of Appeals did not establish any new principles of law, but merely followed a long line of established precedents flowing out of Chief Justice Marshall's decision in *Sturges* v. *Crowninshield*, 4 Wheaton 122, and terminating in *Pobreslo* v. *Boyd*, 287 U. S. 518, and *Johnson* v. *Star*, 287 U. S. 527. The principles established in these and many other cases during the intervening years do not now require either review or clarification.

2. The Decision of the Court of Appeals Follows the Controlling Decisions of the United States Supreme Court and Is in Accord With Decisions of Other Courts of Appeals.

Of primary importance here was the case of *Pobreslo* v. *Boyd*, 287 U. S. 518, wherein the Supreme Court of the United States ruled that Chapter 128 of the Wisconsin Statutes of 1935, regulating voluntary assignments in state courts, was not in conflict with the Bankruptcy Act. Beginning with this premise (App. app. pp. 21-22), the Court of Appeals then analyzed the changes which were made in the Wisconsin Statutes between Chapter 128, Wis. Stats. 1935 and Chapter 128, Wis. Stats. 1937, which was under attack here (App. app. pp. 24-29). The Court of Appeals then found that there were no significant changes which altered the character and purpose or the powers and procedures of the earlier act (App. app. p. 29). It followed then, that this case was controlled by *Pobreslo* v. *Boyd, supra,* and the new act, like the old, was valid.

This decision goes on the principle that a State administered system of insolvency proceedings is not *ipso facto* in conflict with the Federal system established under the National Bankruptcy Act (11 U. S. Code, Sec. 1, *et seq.*). In arriving at its conclusion that a statute of the type represented by Chapter 128, Wis. Stats. 1937 does not conflict with the National Bankruptcy Act, the Court of Appeals for the Seventh Circuit came to the same conclusion as the Court of Appeals for the Third Circuit, *In re Distiller's Factors Corp.*, 187 Fed. (2d) 685, and the Court of Appeals of the Fifth Circuit in *Atlantic Floor and Insulation Co.* v. *Oberdorfer*, 136 Fed. (2nd) 457, 146 Fed. (2nd) 884. The present decision of the Court of Appeals is also in accord with a recent well-reasoned decision of the

United States District Court for Minnesota, *In re Schwartz Bros. Inc.*, 58 Fed. Supp. 761.

It may be noted that the Court of Appeals for the Seventh Circuit arrived at its conclusion independently of the Third and the Fifth Circuits, since it did not cite or rely on these cases as precedents. Its decision was based entirely on the principles established by the decisions of the United States Supreme Court.

The unanimity of opinion indicates that the principles established to deal with this type of problem require no further clarification or restatement.

There is no such conflict as claimed to exist between our case and the cases relied upon by appellant, *First National Bank in Albuquerque* v. *Robinson*, 107 Fed. (2nd) 50; *In re Smith*, 92 Fed. 135; and *In re Salmon and Salmon*, 143 Fed. 395. In *First National Bank in Albuquerque* v. *Robinson*, 107 Fed. (2nd) 50, the State statute involved was a reorganization law which permitted the alteration or discharge of creditors' obligations. Furthermore, there a State Court receiver, was vested with title to corporate assets outside the State of his appointment. These features of the act, in effect respectively a discharge provision and a provision extending the territorial jurisdiction of the State Courts, brought the New Mexico statute into conflict with the Federal Bankruptcy Act and rendered the State act void. Neither of such features are present in our case.

Both the *Smith* case and *Salmon* case relied upon by appellant were District Court decisions many years earlier than *Pobreslo* v. *Boyd, supra.* Insofar as contrary to the latter in principle, they should not be followed. Careful analysis will indicate that the *Smith* case was apparently based on an unwarranted extension of the limited holding of *In re Watts*, 190 U. S. 1. The *Salmon* case involved a

State statute which provided that in case of liquidation of State banks, the State courts had exclusive jurisdiction even as against a Federal Bankruptcy within the four month period following the appointment of a State Court receiver. The Federal Court properly held that a State law could not attempt to oust the Federal Court of jurisdiction and that such State law was therefore void.

Appellant also attempts to find authority for his position in the case of *Pennsylvania* v. *Nelson*, 350 U. S. 497. At page 14 of his petition for certiorari, he cites the tests as recently clarified by the Supreme Court of the United States, with reference to the problem of when a conflict between a State law and a Federal law covering the same subject matter renders the State law void. These tests are: (1) Is the scheme of Federal regulation so pervasive as to make reasonable an inference that Congress left no room for the States to supplement it; (2) Is the Federal interest so dominant in the field that the Federal system must be assumed to preclude enforcement of State laws on the same subject; (3) Does enforcement of State law present a serious danger of conflict with administration of the Federal program?

It should be noted that under the tests of *Pennsylvania* v. *Nelson* there is not such a conflict between the Federal and State jurisdictions in the field of insolvency legislation as would invalidate the State law. The scheme of Federal law here, expressly preserves State jurisdiction, as shown in section 2a (21) of the Bankruptcy Act (11 U. S. C. 2(21)). There is no Federal interest in insolvency matters which renders the subject of paramount Federal interest as opposed to the State's. There is no impediment of the Federal Bankruptcy Act created by State systems. In fact, the Bankruptcy Act itself provides for orderly transfer of State proceedings to Federal courts, only if Federal proceedings are commenced within four

months of the State proceedings. Bankruptcy Act, Section 3, 11 U. S. C., Sec. 21 (a) (4) and (5).

By reason of the foregoing it is respectfully submitted that the decision of the Court of Appeals of the Seventh Circuit in this case is not in conflict but rather is in complete accord with all of the established principles of law as expressed in the controlling precedents.

3. The Differences Between the District Court and the Court of Appeals, Resolve into Differences as to Interpretation of State Law, Not of Federal Law.

A comparison of the decisions of the District Court and the Court of Appeals in this case indicates that the two courts agreed on the principles of *Federal* law applicable. On these principles, both courts came to the conclusion that those parts of Chapter 128, Wis. Stats. which regulated voluntary assignments, equity receiverships, debtor and creditor rights, and fraudulent conveyances were not in conflict with the National Bankruptcy Act (See opinion of District Court at page 66 of the printed record, and the analysis of the Court of Appeals at pages 24 to 29 of Appellant's Appendix.) Both Courts agreed that the provisions of Chapter 128 with reference to involuntary proceedings were suspended. (Record p. 72; App. app. p. 26).

However, the District Court and the Court of Appeals reached opposite conclusions in the result of this case because of two differences in their analysis of the 1937 Statute.

The District Court, viewing the *similarities between Chapter 128, Wis. Stats. 1937 and the National Bankruptcy Act,* came to the conclusion that the changes between the 1935 Statute and the 1937 Statute were so sweeping, substantial and far reaching that it changes the character of the Act from a court administered system for voluntary

assignments to an Act tantamount to bankruptcy. (R. 74-75). The Court of Appeals, viewing the *similarities and differences between the 1937 and the 1935 Act,* came to the conclusion that the new Act was substantially a reenactment of the earlier law. (App. app. 29-30). The difference between the two courts on this point resolves into a question of the interpretation of a State statute.

The second disagreement between the District Court and the Court of Appeals arises because of application of the Wisconsin doctrine as to severability of statutes. The District Court, without citing authorities held that the voluntary provisions of Chapter 128 were not severable from the involuntary provision and hence the entire act was suspended. (Record 75-76). The Court of Appeals, citing Wisconsin authority held that the voluntary provisions were severable from the involuntary provisions and could stand alone. (App. app. pp. 31-32.) Here again, the difference does not arise because of *Federal* rule, but arises from differing views on the *Wisconsin* rule as to when a statute will be considered severable and when it is not severable. Again, the difference resolves into a question of interpretation of a State rule of law.

Both of the matters of State law involved,—whether the statute was a revision of pre-existing law or a new statutory scheme, and whether the voluntary and involuntary provisions are severable,—are in reality questions not of *kind* but of *degree.* The Court of Appeals, after analyzing the changes mentioned in appellant's petition for certiorari, and many others, still found that there were sufficient similarities between the new and the old statutes and that the differences were of such a limited nature, that the new was a *revision* rather than a *replacement* of the old. The Court of Appeals further found that the involuntary provisions did not pervade the statute to such an extent that invalidation of such provisions would strike

down the entire statute. The District Court on the other hand, gave more weight to the changes in the old statute, and less weight to the similarities, and gave more weight to the involuntary provisions in reaching contrary conclusions.

It is submitted that another review of this statute, with the Supreme Court of the United States expressing its opinion on the matter of degree, will not add materially to clarification of any important question of general law. Both of these questions of State law must ultimately be resolved by the Wisconsin Supreme Court, and its conclusion will be controlling in both State and Federal Courts. *Dorchy* v. *Kansas*, 264 U. S. 286; *Pobreslo* v. *Boyd*, 287 U. S. 518.

In the petition for certiorari (p. 18), appears a statement that the City of Milwaukee and the State of Wisconsin have agreed that the State Act is superseded by the Federal Act. We challenge this statement. An assistant city attorney of the City of Milwaukee, and an attorney for the Industrial Commission of Wisconsin filed a joint request for leave to submit briefs *amicus curiae* on the Trustee's motion for rehearing before the Court of Appeals for the Seventh Circuit. This request was not signed by the Attorney General of Wisconsin, nor by the authorized law officer, *i. e.* the City Attorney of the City of Milwaukee as would have been required under Supreme Court Rule 42 (4). The individuals who signed the request were in both cases primarily charged with the task of collecting taxes, and found it expedient to present their motion in order to improve their respective priorities with reference to Federal Taxes on final distribution of assets in insolvent estates. We question whether the responsible public officers of the State of Wisconsin would attack the validity of a State statute.

Conclusion.

For the reasons stated, it is respectfully submitted that there is no basis for the issuance of a writ of certiorari in this case under Rule 19 (1) (b) of the Rules of the Supreme Court of the United States.

The petition for writ of Certiorari ought to be denied.

Respectfully submitted,

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ARTHUR MAGIDSON,
FRANK K. LEVIN,
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